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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JASON PAUL LEGARE,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Real Party in Interest.

G057694

(Super. Ct. No. C-90278)

O P I N I O N

Original proceedings; petition for a writ of prohibition/mandate to challenge an order of the Superior Court of Orange County, Kimberly Menninger, Judge. Petition granted.

Sharon Petrosino, Public Defender, and Deputy Public Defender Mark Kim for Petitioner.

No appearance by Real Party in Interest Todd Spitzer, District Attorney.

THE COURT:\*

Petitioner Jason Paul Legare filed a peremptory challenge to respondent court pursuant section 170.6 of the Code of Civil Procedure.<sup>1</sup> Legare contends respondent court improperly assigned the case to itself as an all purpose assignment and wrongfully denied the peremptory challenge as untimely. We agree and the petition is granted.

#### PROCEDURAL FACTS

In 1992 petitioner, Jason Paul Legare, pleaded guilty to second degree murder. On February 19, 2019, Legare filed a petition for resentencing pursuant to Penal Code section 1170.95. The docket entry on March 15 states, “Court read and considered the petition filed per Penal Code Section 1170.95 for purposes of assignment and to address the appointment of counsel.” Respondent court appointed the Public Defender’s Office to represent Legare and the docket states, “Case is assigned to Judge Kimberly Menninger in Department C5 for purposes of the petition filed per Penal Code Section 1170.95.”

The People filed a response to the petition on April 22, and with no date scheduled for a hearing, on April 24, 2019, Legare filed a peremptory challenge to respondent court pursuant to section 170.6. On the same day, respondent court determined the peremptory challenge was untimely and filed an order that states, “The Defense motion to challenge this court pursuant to California Code of Civil Procedure 170.6 is denied because it is untimely as this was an assignment made for all purposes as were all of my assignments of 1170.95 cases to the judges to which they have been assigned since 1-2-19.”

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\* Before Aronson, Acting P. J., Fybel, J., and Thompson, J.

<sup>1</sup> All further references are to the Code of Civil Procedure unless otherwise noted.

Two days after respondent court denied the peremptory challenge as untimely because of the purported all purpose assignment, the court made a second all purpose assignment of the case to itself in a nunc pro tunc order entered on April 26, 2019, that states, “The Court orders the minutes of 3/15/19 be updated to correctly reflect the assignment to Judge Menninger, was made for all-purposes.”

In response to the nunc pro tunc all purpose assignment on April 26, Legare filed a second peremptory challenge on April 29. Judge Lance Jensen denied the challenge and the docket states, “Decision made in the Order filed 04/24/2019, is to remain.”

On May 7, 2019, Legare filed a petition for writ of prohibition or mandate and a request for an immediate stay asking this court to direct respondent court to vacate the order denying Legare’s peremptory challenge and to enter an order granting the peremptory challenge. Citing *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180, this court invited real party to file an informal response to the petition. On May 13, 2019, real party advised the court that it “does not intend to file a response.”

## DISCUSSION

Section 170.6 pinpoints when a peremptory challenge should be made. The statute provides for the 10-day/5-day rule, the master calendar court rule, and the all purpose assignment rule. Subdivision (a)(2) of section 170.6 states in relevant part that “[i]f [a peremptory challenge is] directed to the trial of a criminal cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance.”

Presumably respondent court determined the peremptory challenge filed on April 24 was untimely because it was filed more than 10 days after the first purported all

purpose assignment on March 15. However, whether respondent court made an all purpose assignment of the case on March 15, or in the nunc pro tunc order on April 26, is of no consequence because the all purpose assignment rule does not apply at this stage in the proceeding because the peremptory challenge is not “directed to the trial of a criminal cause.” Because the petition for resentencing pursuant to Penal Code section 1170.95 is a postjudgment proceeding, the usual pretrial rules do not apply. Subdivision (a)(2) of section 170.6 states in relevant part, “If the motion is directed to a hearing, *other than the trial of a cause*, the motion shall be made not later than the commencement of the hearing. In the case of trials or hearings not specifically provided for in this paragraph, the procedure specified herein shall be followed as nearly as possible.” (Emphasis added.)

In a postjudgment proceeding where no hearing date has been set and the court has not made a “determination of contested fact issues relating to the merits,” (§170.6 subd. (a)(2)) a peremptory challenge is timely if made before the commencement of the hearing, or before the court considers and evaluates the petition before granting relief. (*Maas v. Superior Court* (2016) 1 Cal.5th 962, 977.) In this case, at the time Legare filed his peremptory challenge on April 24, 2019, the challenge was timely and should have been granted by respondent court.

#### DISPOSITION

Let a peremptory writ of mandate issue directing respondent court to vacate its order entered on April 24, 2019, denying petitioner’s peremptory challenge made pursuant to section 170.6 of the Code of Civil Procedure, and enter an order granting the peremptory challenge. In the interest of justice, the opinion in this matter is deemed final as to this court forthwith and the clerk is directed to issue the remittitur forthwith. (Cal. Rules of Court, rule 8.490(b)(2)(A).)